Factual Background

Before this case arose, Petitioner had hired Mr. Preister and MidCounty as general contractor on two other construction projects. Before being hired by Mr. Sisson, Mr. Preister was saddled with debts, including IRS debt, and had gone through a Chapter 13 bankruptcy in the U.S. Bankruptcy Court in Greenbelt, Maryland (Case No. 94-10684). He was chronically short of cash and had no credit to speak of. The very first time that the parties met each other in late 1998, Mr. Preister requested a $40,000 loan to pay continuing indebtedness and asked for work from Mr. Sisson. Because of Mr. Preister's chronic need for cash, Mr. Sisson began a practice of advancing funds to Mr. Preister before his construction work was performed. In the summer of 1999, using Mr. Sisson's money provided to MidCounty as advances for work on another construction project, Mr. Preister unilaterally put down a sales contract in his own name on the apartment building located at 1417 Chapin Street, N.W. in Washington, D.C., while Mr. Sisson was on business overseas and without his knowledge. When Mr. Sisson returned, Mr. Preister presented the purchase contract as a possible third project for the two of them, where as before Mr. Sisson would own and manage the Project to convert the apartments to condominiums for sale and Mr. Preister would act as general contractor for the renovations. The Chapin Condo Project involved developing a 33,000 square foot apartment building into 24, 2-bedroom condominium units with underground parking.

The chronology was as follows: On September 24, 1999, drawing on funds that Mr. Sisson provided to Mr. Preister's company for work to be performed on another construction project, MidCounty (not Mr. Preister) put down $25,000 of Mr. Sisson's funds towards the purchase

of the Chapin apartment building for $495,000. All of the funds to purchase the Chapin property came from Mr. Sisson, as Mr. Preister as a discharged bankrupt was chronically short of cash. To be sure, Mr. Preister maintained in his testimony that these were his funds, but his four written proposed joint LLC agreements impeached his claim. When Mr. Sisson subsequently took over the contract and applied for financing, he did so for himself, not for Mr. Preister or for any joint venture with Mr. Preister. The loan application to the Bank made no reference to Mr. Preister or MidCounty, as confirmed by the loan documents and testimony by Petitioner and John Saunders, the loan agent from the Bank. Had Mr. Preister been a partner as he claimed only the following year, no bank would have been willing to extend financing.

Following Mr. Sisson's second $25,000 down payment through his advance to MidCounty to extend the settlement date, a sales contract addendum was created providing that the sales contract could be assigned to Petitioner. At this crucial time, Mr. Preister made no mention of any claimed oral contract with Mr. Sisson to joint venture the project. Mr. Preister was happy to get the renovation construction work on this Project. Mr. Sisson informed the real estate closing attorney, Mr. Robert Cerullo, that Mr. Sisson would be taking over the purchase contract, but the attorney negligently failed to secure the assignment to Mr. Sisson. The jury found that the real estate closing attorney and his firm were negligent in failing to assign the purchase contract to Mr. Sisson. (App. 13-16.)

Mr. Sisson obtained financing approval from the Bank on December 16, 1999. Notably, during the entire process of obtaining financing, Mr. Preister neither

provided, nor did the lender ask for, any financial information on Mr. Preister or MidCounty -- hardly consistent with Preister's claim to be a 50% owner through oral agreement. Significantly, during the critical phase when the property was being purchased, Mr. Preister made no pretense to Mr. Sisson, the Bank or anyone else about claiming a 50 percent ownership interest in the Project.[2]

On December 16, 1999, Petitioner created the 1417 Chapin Street LLC in which he was the *sole member*, to purchase, renovate and develop the Chapin Street apartments. Following the formation of Mr. Sisson's LLC, closing attorney Cerullo drafted a document removing Mr. Preister as purchaser and replacing him with Mr. Sisson's 1417 Chapin Street LLC. Subsequently, on the evening of Friday, December 17, 1999, after the purchase contract had expired, the closing occurred at Mr. Cerullo's home, with Mr. Sisson's LLC purchasing the Chapin Property. Mr. Sisson's lender wired $400,000 to the real estate attorney, and Mr. Sisson provided a check for roughly $60,000, in addition to the $50,000 in two downpayment installments that Mr. Sisson had already provided that were paid through MidCounty. In short, all the money at the closing came from Mr. Sisson; none came from Mr. Preister.

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[2] In finding that the parties had entered into an oral contract (App. 1-3 & 7), the Court of Appeals cited Mr. Sisson's November 17, 1999 e-mail to Mr. Preister: "Dana, I know you are moving mountains back there in my absence and I appreciate how you are making sure everything is moving along." (App. 3.) Mr. Sisson's email was in reply to Mr. Preister's email about a completely different project having nothing to do with the Chapin Project; and Mr. Preister's email and Mr. Sisson's testimony so established. It does not support the alleged oral contract.

A few days after the closing, in order to confirm that the closing took place and that construction could proceed, Mr. Sisson provided Mr. Preister with a copy of the settlement papers and a copy of Mr. Sisson's Chapin LLC agreement showing Sisson as sole LLC member. Respondent voiced no objection about his name not being included and made no pretense to being a 50 percent owner. Remarkably, given Respondent's subsequent claim to be a 50% owner via oral contract of the Chapin Project, Respondent failed to protest the closing with closing attorney Cerullo, Community Bank or with anyone else. In fact, it was not until nine months after Mr. Sisson's LLC closed on the Chapin apartment building that Mr. Preister approached Mr. Sisson with draft LLC documents that proposed that MidCounty receive a 1/3 equity membership in the LLC. Even then, Mr. Preister proposed a draft agreement to serve as the *revised* operating agreement for the LLC, acknowledging that Mr. Sisson was the sole owner of the LLC.

It is undisputed documentary record that Mr. Preister proposed four separate draft agreements to Mr. Sisson containing different proposed equity allocations for a joint LLC *with MidCounty*:

- In the summer of 2000, Mr. Preister proposed a draft LLC agreement that reflected a 2/3 Sisson, 1/3 MidCounty profit split. It also acknowledged that Mr. Sisson had made the entire capital contribution of $100,000 toward purchase the building. Mr. Preister's draft stipulated that he be granted veto control over operation of the LLC, though he would not be making a financial contribution of more than $100. Mr. Sisson refused to sign.

- Next, Mr. Preister proposed a revised draft LLC agreement, which again acknowledged that Mr. Sisson made the entire capital contribution to purchase the building and retained the provision granting him veto power, but revised the profit split to 70% to Mr. Sisson and 30% to MidCounty. Mr. Sisson refused to sign.

- Mr. Preister next proposed a supplement to the 30 percent draft agreement, dropping the provision for his veto power over operations. Mr. Sisson refused to sign.

- In the end, Mr. Preister proposed a 50/50 equity allocation between Mr. Sisson and MidCounty. Mr. Sisson refused to sign.

In sum, the documentary trial record proved that Mr. Sisson declined to allow Mr. Preister or MidCounty to become an LLC member. In the end Petitioner continued with the Chapin Condo Project on his own. Petitioner's LLC borrowed $2.5 million from a trust established by Sisson, $1 million from Mr. Sisson, $200,000 from Mr. Sisson's sister and $1.4 million from Community Bank to complete the Chapin Condo Project.

In addition, the trial evidence established that the parties never reached agreement as to any of the material terms of the proposed LLC agreement or any joint business that Mr. Preister had sought -- (a) how equity ownership would be allocated in any joint LLC, (b) how profits or losses would be divided, (c) what would be the respective financial contributions, (d) or even who would be a member of the proposed LLC. Mr. Preister further testified that the alleged oral contract afforded him the right to buy out Mr. Sisson at any time up until construction commenced for whatever costs Mr. Sisson had invested up

to that point in time. Even Mr. Preister's attorney's written drafts thought best not to include such a one-sided buy-out right that Respondent claimed in his oral contract.

The case went to trial in the District of Columbia Superior Court in November 2002. Charles Sisson did not receive a fair trial. A case that should never have gone to the jury resulted in a $650,000 verdict against Petitioner on Respondent's alleged oral contract.

When defendant closing attorney Robert Cerullo testified on direct that he assumed that Messrs. Sisson and Preister were business partners, the trial court had properly struck the testimony as outside the record. Yet, when Mr. Cerullo's expert witness, Arthur Konopka, an attorney, was later called to testify as to the standard of care for real estate attorneys in the District of Columbia, he testified he based his opinion (that Cerullo had satisfied the standard of care) on a partnership between Messrs. Sisson and Preister with regard to the Chapin property. (App. 31-32) Such testimony by the attorney expert went to the core of the controversy -- Mr. Preister's claim of an oral contract, which Mr. Sisson denied. The expert's testimony was extremely prejudicial to Petitioner -- making Charles Sisson out to be a liar on the critical issue in the case.

The prejudice is vividly demonstrated in the jury's returning a fraud verdict. (App. 12.) Mr. Konopka's testimony as to a partnership was not only contrary to the trial evidence, but it was outside his expertise. The trial judge stated: "Whether he purports to be or not, [Mr. Konopka] was not proffered in that area ...." (App. 31.) The expert's Rule 26(b) (3) statement contained no such opinion, and his opinion testimony at trial surprised both the court and the parties. Though Mr. Sisson's trial counsel moved for mistrial,

the trial court denied Mr. Sisson's motion. The court, though, recognized the prejudice and sought to give a curative instruction: "And so *if there is testimony in the case*, I am not saying there is, but if there is testimony in the case, if there is evidence in the case that Cerullo knew that, that's for you to decide. The expert witness was asked to make assumptions. And based on those assumptions, to render his opinion. But the assumptions that he was asked to make has to be based on the evidence in the case. And whether there is evidence in this case that Cerullo knew of a partnership between those men is for you to decide. And, in fact, whether there was a partnership between them is for you to decide." (App. 33) This cured nothing. As worded, the instruction reinforced Konopka's testimony that there was a partnership to which he had testified. Mr. Sisson's trial counsel objected at trial and raised this argument in the Court of Appeals. The instruction as worded reinforced Mr. Konopka's testimony that there was a partnership and that the jury could consider the expert's own testimony in reaching its decision on partnership. The damage was done. Even Mr. Preister's trial counsel moved to strike Konopka's testimony in that "it was predicated on a fact not in the record, mainly Mr. Cerullo believed that a partnership existed between Mr. Preister and Mr. Sisson." This contrary-to-the-record testimony by the expert severely poisoned the well and made a fair trial impossible. Nonetheless, the Court of Appeals ruled that "there was no abuse of discretion" in denying the motion for mistrial. (App. 11.) How could there be no abuse of discretion where the jury came back with a fraud verdict, though there was no evidence of a material misrepresentation by Mr. Sisson that could possibly have supported a fraud verdict? Neither the Court of Appeals nor the trial court (App. 20-22) cites any misrepresentation of a material fact to support the fraud verdict.

Beyond that, the jury's award of $650,000 damages against Petitioner (an assumption that total projected profits on the condominium project would be $1.3 million), was not supported by "substantial evidence." Doe v. Binker, 492 A.2d 857, 860 (D.C. 1985). When damages are awarded, there must be a reasonable basis on which to estimate damages. Romer v. District of Columbia, 449 A.2d 1097, 1100 (D.C. 1982). But the jury's $650,000 award to Mr. Preister is unsupported. Mr. Preister's "expert" on damages, Mr. Riley, was a real estate appraiser without an accounting or CPA background or college degree. The trial court gave him the green light to speculate as to projected future lost profits on a proposed startup business without any rational basis. Mr. Riley did not possess expertise in projecting future lost profits on a not-yet-existent condominium conversion. Mr. Riley's testimony was pure conjecture that should have been disallowed and as to which Petitioner's trial counsel objected. "Expert testimony that is 'based on mere speculation or guesswork,' Morgan v. Psychiatric Inst. of Washington, 692 A.2d 417, 426 (D.C. 1997) ... or that '[is not] based upon evidence in the record,' District of Columbia v. Barriteau, 399 A.2d 563, 569 (D.C. 1979), 'can[not] provide a rational basis for the jury's determination of an individual's future earnings ....'" Hughes v. Pender, 391 A.2d 259, 263 (D.C. 1978); see also Morgan, *supra*, 692 A.2d at 426; Croley v. Republican National Committee, 759 A.2d 682 (D.C. 2000).

Indeed, where all four of Mr. Preister's draft agreements proposed a contract between Mr. Sisson and MidCounty, how could there be any rational basis for the $650,000 judgment in favor of Mr. Preister when he was not the proposed contracting party in his own drafts? There was no evidence at trial that established Mr. Preister as the sole owner of

MidCounty. There was no ruling that permitted the corporate veil of MidCounty to be pierced to permit Mr. Preister to collect alleged damages of MidCounty on any sort of purported alter ego theory. Nor was any such theory argued below. There was no lawful basis to treat Mr. Preister as the contracting party in view of his own draft agreements. Though this matter was raised and briefed in Petitioner's appeal, the Court of Appeals remained silent on this fundamental Due Process defect in the judgment below, working a fundamental unfairness and a violation of substantive due process.

> Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action: "The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheat. 235-244 [(1819)]: 'As to the words from Magna Charta ... the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.' " Hurtado v. California, 110 U.S. 516, 527 (1884). We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," Wolff v. McDonnell, 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, see, e.g. , Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate

> governmental objective, see, e.g. , Daniels v. Williams , 474 U.S. 327, 331 (1986) (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised),

County of Sacramento v. Lewis, 523 U.S. 833 (1998).

In addition, the trial court denied a fair trial by failing to mitigate damages (alleged lost profits on the alleged joint condo project) by offsetting profits from Mr. Preister's other construction work when Mr. Preister would have had to devote full time to the Chapin Condo Project. Mr. Preister admitted that he had earned approximately $380,000 in profits during the one year period when he would have had to spend all his time on the Chapin Condo Project. At a minimum, these profits should have been offset against Mr. Preister's claimed damages.

In sum, the lower courts in these totality of circumstances deprived Petitioner of Due Process. The Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." There was no 50/50 oral contract between the parties to begin with. Preister's story was preposterous on its face. Respondent's own draft agreements proved that there was no contract. There was no agreement on any material term, and the Court of Appeals held that there was no agreement as to the form of the business (App. 8), itself a highly material term in a multi-million dollar project, as it would significantly affect taxation and liabilities of the owners. Even who Mr. Preister wanted as the contracting parties kept changing as between his claimed oral contract

(Mr. Preister) and his draft agreements (MidCounty). An egregious miscarriage of justice has resulted and Petitioner's right to Due Process has been violated.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION EVISCERATES THE STATUTE OF FRAUDS

Doubtless the safeguarding the Statute of Frauds presents an issue of great national importance. If the rule of law adopted by the Court of Appeals is sustained in the state courts and federal circuits, then the Statute of Frauds, which was designed to prevent fraud in real estate and other contracting, will be eviscerated. The rule adopted by the lower courts is an invitation to the unscrupulous to commit fraud by alleging an oral contract when it suits them. There are compelling public policies that underlie the Statute of Frauds requirement for signed writings. "The statute of frauds mandates that certain agreements, including those concerning real estate, must be in writing 'to guard against perjury and protect against unfounded and fraudulent claims.'" Tauber v. District of Columbia, 511 A.2d 23, 27 (D.C. 1986). It was to avoid such outright scams that the states adopted the Statute of Frauds from English law. The Statute of Frauds, first enacted in England in 1677, 29 Car. II, Cap. 3, was "intended to guard against the perils of perjury and error in the spoken word, and to protect defendants against unfounded and fraudulent claims." Hackney v. Morelite Construction, D.C. Corp., 418 A.2d 1062, 1065-66 (D.C. 1980), quoting 3 Williston on Contracts § 448-at 344 (3d ed. 1960).

This case should not have gone to the jury in the first place, as the fictitious oral contract alleged was void as a matter of law under the Statute of Frauds as an agreement incapable of being performed within one year.[3] D.C. CODE § 28-3502, provides: "An action may not be brought ... upon a contract or sale of real estate, of any interest in or concerning it, or upon an agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action is brought, or a memorandum or note thereof, is in writing, which need not state the consideration and signed by the party to be charged therewith or a person authorized by him." The case was also baseless in that Respondent's proposed draft agreements, each with changing proposed equity allocations and other terms, refuted any suggestion of an oral contract.

Mr. Preister claimed at trial that in September 1999 he had entered into an oral agreement with Sisson whereby they agreed to purchase, renovate and convert the Chapin

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[3] The Court of Appeals stated (App. 7) that there was some indication that Mr. Sisson may have waived the precise Statute of Frauds arguments because he failed to renew his motion for judgment as a matter of law at the conclusion of all of the evidence at trial. However, the trial judge recognized that Petitioner's trial attorney had reserved all rights on his motion for judgment: "[To Mr. McMahon] Reserving all rights, do you have any evidence that you want to lead off with at this time?" (App. 25-26.) Further, when another defendant's counsel, Mr. Fuchs (counsel for Mr. Cerullo) stated: "Your honor ... *I presume all rights are reserved for all defendants?*," the trial judge answered, "*Absolutely.*" Id. The trial court heard legal argument on the motion for a directed verdict (11/18/02 trial tr. 195-222), and denied the motion (id., 211). In the end, the Court of Appeals declined to decide Mr. Preister's argument that the Statute of Frauds defense was not preserved.

apartment to condominiums through a limited liability company on a 50/50 basis and to divide the profits from the condo sales equally. (App. 23-24). The alleged contract was incapable of being performed within one year. The permit from the D.C. government takes a year to procure, construction takes at least another year; the condominium documents have to be prepared and approved by the D.C. government; and the marketing of the units takes another year. Only after all these steps have been successfully completed does D.C. Code 42-1903.16 mandate that the project post a bond for two years to warranty the renovation and conversion work. Thus, the Project could not be completed in less than five years, two years of which are mandated by law.

Further, the terms of Preister's four proposed operating agreements for a joint LLC conclusively demonstrate that the agreement could not be performed within one year. The common language of Mr. Preister's 25-page proposed drafts for a joint LLC establish that it was impossible to perform the alleged oral contract within one year, even from the terms of the proposed agreement. Respondent's drafts state that: "The purpose of the Company shall be to own and develop and otherwise deal in 24 condominium units, located in the District of Columbia, at 1417 Chapin Street, NW ...." (Supp.R. No. 1: 572). These drafts provided for annual meetings "on the second Monday of January of each year at ten o'clock." (*Id.*, 575). The proposed agreements provided for orderly liquidation within 18 months if the members determined to liquidate the company (*id.*, 586) -- evidence that even a liquidation of the proposed joint company would take more than a year. The drafts required that "within 90 days from the close of each fiscal year of the Company," the Company was to deliver financial and operating statements and tax

returns to the members. (*Id.*, 587). It required the Company to prepare and file all federal, state and local income tax returns "for each fiscal year." (*Id.*) In short, Mr. Preister's drafts prove that the contract was not susceptible to being performed within one year.

Mr. Preister admitted in his testimony that the Project would take five years (App. 28-30). He claimed the oral agreement was made in September of 1999. (id.). MidCounty was to start work at the beginning of 2000 and finish in 2001. (id.). Mr. Preister anticipated that the units would be sold out sometime towards the end of 2001 and the required bond would be posted. (id.). D.C. Code 42-1903.16 requires that declarants of condominium conversions must post a bond and wait at least two years after the condominium units have been sold before reaping profits. Mr. Preister did not anticipate receiving profits represented by the bond until 2004, roughly five years after the parties entered into the alleged oral contract. (id.). The 2-year statutory bond requirement under D.C. Code § 42-1903.16 is incorporated by reference into the alleged contract. For this additional reason, the claimed oral contract was not susceptible of being performed within one year.

Not only do oral contracts where the parties explicitly agree to a time of performance of more than one year fall within the statute, but "[a] parol contract to do something which by law the promisor is not permitted to do within a year is [also] within the statute." 37 C.J.S. *Frauds, Statute of* § 44 (2003). Even where the parties do not agree on a specific time period for performance, the contract is not enforceable where it is incapable of being performed within one year. See Coan v. Orsinger, 265 F.2d 575, 575-76 (D.C. Cir. 1959)(court struck down the contract under

the Statute of Frauds because the parties had agreed to a performance timetable governed by the duration of law school studies, a 3-year time period mandated by a non-party entity); Massion v. Mt. Sinai Congregation, 276 P. 930, 931 (Wyo. 1929). Significantly, in Belmont Realty Corp. v. Rhode Island Hosp. Trust Nat'l Bank, 116 B.R. 21 (Bankr. D.R.I. 1990), the plaintiff/debtor alleged that it had an oral contract with the bank/defendant that the bank would not call in a demand note until the plaintiff/debtor completed and sold a designated condominium project. See id. at 23, n. 1. On summary judgment, the court invalidated the oral agreement under the Statute of Frauds, noting that testimony of a particular witness indicated "that it would take a year, year-and-a-half to complete all of the approvals needed for the project." Id. at 23. The court pointedly noted that "this one to one and one-half year period fails to include the time required to construct and sell the condominium units." Id. Thus, the agreement "was not susceptible to performance within one year." Id.

Separate and apart from the Statute of Frauds writing requirement, a limited liability company cannot be formed by oral contract. There are compelling public policies that mandate that a limited liability company may only be formed by written articles filed with the state. Under D.C. statutory law, a limited liability company may only be formed through written and signed articles filed with the Mayor's Office. D.C. Code § 29-1002 (1981) provides that "one or more persons may form a limited liability company by signing and filing articles of organization with the Mayor." Parties to a joint LLC must jointly sign the articles filed with the Mayor's office to form their LLC. At trial, Mr. Preister's own legal expert admitted that all LLC's in the District of Columbia must be in writing. (App. 25). Because no joint LLC was signed

and filed with the Mayor's Office, the joint LLC sought by Mr. Preister was never formed and Mr. Preister's claimed oral contract was unenforceable under D.C. Code § 29-1002.

The Court of Appeals held that partial performance of the claimed oral contract removed it from application of the Statute of Frauds in reliance upon its prior decision in Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 313 (D.C. 1982). (App. 8.) The Court stated: "Mr. Preister signed a contract of purchase for acquisition of the Chapin Street property, made an initial $25,000.00 deposit, paid the $2,500.00 appraisal fee, and put down an additional $25,000.00 after the deadline for closing had expired. Mr. Sisson approached a bank for financing. This partial performance under the oral agreement removed it from the Statute of Frauds." (App. 8.) Yet, the Court of Appeals' previous decisions demonstrate that this "limited exception to the statute of frauds" cannot be invoked by Mr. Preister:

> An oral agreement to purchase land is taken out of the Statute of Frauds only when the purchaser has changed his position so materially that unless the oral contract is enforced, fraud will result. [Citations omitted.] Mere refusal to perform an oral contract within the statute does not generally constitute such fraud as to raise the estoppel. [Citation omitted.] In order to effectively assert estoppel, the promisee must be able to show that he has changed his position substantially for the worse and that he has incurred unjust and unconscionable injury. *Williston on Contracts* § 533, at 808 (3d ed. 1959).

Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 313-14 (D.C. 1982). See also Railan v. Katyal, 766 A.2d 998, 1007 (D.C. 2001)(the limited partial performance exception to the statute of frauds is based on promissory estoppel); Chatman v. Lawlor, 831 A.2d 395 (D.C. 2003); Cook v. Edgewood Mgmt. Corp., 825 A.2d 939 (D.C. 2003); Perry v. Gallaudet Univ., 738 A.2d 1222 (D.C. 1999); Fitzgerald v. Hunter Concessions, 710 A.2d 863 (D.C. 1998); Chamberlain v. Barry, 606 A.2d 156 (D.C. 1992). Mr. Preister cannot rely on promissory estoppel as he did not substantially change his position for the worse based on the alleged oral contract, and made no such showing either at trial or in his brief in the Court of Appeals. In fact, he testified that he earned $380,000 on other construction jobs within the next year. Mr. Preister, fresh from a Chapter 13 bankruptcy only a few years earlier, did not have $52,500 in funds for the earnest money and appraisal on the contract to purchase the Chapin property to begin with; nor could he have borrowed the remainder of the $495,000 purchase price. In fact, in early 2000, Mr. Preister borrowed an additional $49,000 from Mr. Sisson to cover IRS back taxes, for which the jury awarded Mr. Sisson a verdict. (App. 15-16) The funds that Mr. Preister used for the downpayments on the Chapin property were funds advanced by Mr. Sisson to MidCounty on work yet to be performed on another project for which Mr. Sisson had hired MidCounty as contractor. There was no partial performance of any oral contract by Mr. Preister.

Neither did Mr. Sisson partially perform the alleged oral contract by "approaching a bank for financing" (App. 8) as the Court of Appeals erroneously stated.[4] When Mr.

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[4] To be sure, the legal issue under the partial performance limited exception is the promisee's detrimental reliance. Railan v. Katyal,

Sisson took over the purchase contract on the apartment building and later applied for financing, he did so for himself, not for any joint project, as the loan documents and the testimony of Mr. Sisson and John Saunders of Community Bank confirmed. If the Court of Appeals' ruling that Petitioner "partially performed" by applying for financing were adopted by the courts, then any individual who obtains a loan to purchase property, even a family home, would be subject to subsequent claims that their property was purchased by an oral partnership with someone else. Such construction of "partial performance" would eviscerate the Statute of Frauds and fundamentally alter the concept of property ownership, the backbone of the U.S. economy.

Under the rule announced by the Court of Appeals, anyone could claim that an LLC for a multi-million real estate project was formed orally. Such rule would open the floodgates of strike suits in the commercial real estate market, a critical component of the Nation's economy. There are paramount public policies that underlie both the Statute of Frauds and the strict requirements for forming a limited liability company through a public filing. Without these requirements, anyone could claim without a signed writing and mandatory filing with the state or local government that he or she had established a limited liability company with another individual and use that vehicle to commit fraud. It was important enough to avoid such scams that the D.C. Code adopted the express requirement that an LLC may only be formed by a signed writing and filing with the Mayor's Office.

The rule announced by the Court of Appeals entails a

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supra, 766 A.2d at1007.

dangerous erosion of the state corporation codes governing the formation of corporations. To endorse the judgment below would wreak havoc upon limited liability companies and other corporations. It would open the floodgate of strike suits and encourage the unscrupulous to allege "constructive LLC's" without signed articles of organization, even where the other party had repeatedly refused to sign a proposed written agreement for the formation of an LLC.

II. THE COURT OF APPEALS DECISION VIOLATES PETITIONER'S RIGHT TO DUE PROCESS

The enforceability of an oral contract claimed by a discharged bankrupt is at the heart of the decision of the Court of Appeals. If the rule of the Court of Appeals is adopted, it would wreak havoc in the commercial real estate markets. It is not disputed that no signed written agreement was ever made for this multi-million dollar project. The trial record showed that Mr. Preister's attorney proposed four separate LLC draft agreements to Mr. Sisson with changing proposed equity stakes and other terms -- each of which Sisson refused to sign. Mr. Preister proposed that, in exchange for a $100 financial contribution, and coupled with his alleged right to be insulated by Petitioner from any losses, that his company should be made a 50% co-owner of the LLC for the Chapin Condo Project, a project that would require millions of dollars to complete. (Pl. ex. 37, 38, 40, 42.)

Mr. Preister alleged that he made the oral contract in September 1999. Yet Respondent's attorney the following year proposed four separate written draft operating agreements for a joint LLC that refuted the existence of the alleged 50/50 oral contract. Each draft for a joint LLC states that the purpose of the company is "to own and

develop and otherwise deal in 24 condominium units." (Supp.R. No. 1: 572). Mr. Preister first proposed 66.67% interest to Mr. Sisson and 33.33% to Mr. Preister; he next proposed 70% to Mr. Sisson and 30% to Mr. Preister with initial capital contributions of $100,000 by Mr. Sisson and $100 from Mr. Preister. This draft was followed by Mr. Preister's revised version of his 70/30 proposal. Finally, Mr. Preister proposed a 50/50 equity split for a joint LLC. Respondent's drafts each provide for the application of D.C. law. It is undisputed that Sisson refused to sign any of the drafts submitted to him.

The Court of Appeals held in conclusory fashion: "There is legally sufficient evidence on this record showing the intent of Mr. Sisson and Mr. Preister to be bound by their oral agreement, and that there was agreement as to all of the material terms." (App. 8.) The Court failed to specify any record in support of such erroneous conclusion. The parties did not enter a binding contract because they failed to agree on any material terms as to: 1) the ownership allocation or profit and loss split in the proposed LLC; 2) the financial contribution of each party; 3) who the contracting parties would be; 4) whether Mr. Preister would be afforded the right to buy out Mr. Sisson before construction began; and 5) whether Mr. Sisson was to ensure Mr. Preister against losses as Mr. Preister claimed. Even the Court of Appeals stated that "[t]here was no agreement to form an LLC." (App. 8.) How can there be a binding contract without agreement as to the fundamental issue of *the form of the business*, affecting profits, taxation and liabilities of the parties? Without an agreement as to each and every material term, there can be no binding contract. The Court of Appeals' decision is internally inconsistent, and cannot withstand Due Process scrutiny.

A. Petitioner's Substantive Due Process Rights Have Been Violated

In the District of Columbia, "a valid and enforceable contract requires 'both (1) agreement as to all material terms, and (2) intention of the parties to be bound.' There must be an honest and fair 'meeting of the minds' as to all issues in a contract." Simon v. Circle Assoc., Inc., 753 A.2d 1006, 1012 (D.C. 2000) (citations omitted). "If an agreement reached between the parties fails to contain a material term or leaves such a term to future negotiation, then there is no contract." International Cargo Mgmt. Specialists, Inc. v. EG & G Dynatrend, Inc., No. 91-1360, 1995 WL 170376 at *14 (D.D.C. March 31, 1995). The party seeking to prove "the existence of a contract has the burden of proof on that issue." Jack Baker, Inc. v. Office Space Dev. Corp., 664 A.2d 1236, 1238 (D.C. 1995).

The parties in this case were unable to agree on the material terms of Preister's varying proposals. The Court of Appeals held that there was no agreement as to the form of the business. (App. 8.) Nor was there any intention of Petitioner to be bound by an oral contract in September 1999 when Preister himself proposed draft upon draft inconsistent with the alleged oral contract.

Parties may not only make enforceable oral agreements, but they may also enter into an oral "enforceable contract binding them to prepare and execute a subsequent documentary agreement." Id., 664 A.2d at 1239 (citations omitted). Pressed on cross-examination, Mr. Preister readily conceded that he merely "had a contract to make a contract." (App. 24) However,

> [i]n order that such [agreement to make an agreement] may be in effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document ... If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called 'contract' to make a contract is not a contract at all. (emphasis added)

664 A.2d at 1239. Unless the party seeking enforcement of an oral contract to make a subsequent written contract "can show that the contemplated written document is to be '*a mere memorial of the agreement already reached*,' it cannot prevail." Id. See Edmund J. Flynn Co. v. LaVay, 431 A.2d 543, 547 (D.C. 1981) ("material terms cannot be left to future settlement"). Where parties enter into an oral contract to make a contract, the burden upon the party seeking enforcement "is particularly onerous." Id. at 1238.

That heavy burden was not met where the parties were unable to agree on a single material term and where the Court of Appeals held they had not agreed even on *what form* the business would take. (App. 8.) How can there be "agreement as to all of the material terms" (App. 8) where the Court of Appeals found there was no agreement even as to the basic form of the business, itself a material terms with significant tax and liabilities implications?

The alleged oral contract, based on the record facts in this case, offends the standards of substantive Due Process that protect Mr. Sisson's property interest. The totality of the circumstances shocks the conscience. The provision that "[n]o State shall . . . deprive any person of

life, liberty, or property, without due process of law," U. S. Const., Amdt. 14, §1, "guarante[es] more than fair process," Washington v. Glucksberg, 521 U. S. 702 (1997), and covers substantive Due Process, "barring certain government actions regardless of the fairness of the procedures used to implement them," Daniels v. Williams, 474 U.S. 327, 331 (1986); Zinermon v. Burch, 494 U.S. 113, 125 (1990) (substantive due process violations actionable under §1983). In Collins v. Harker Heights, 503 U.S. 115, 126 (1992), the Court stated that the Due Process Clause was intended to prevent government officials " 'from abusing [their] power, or employing it as an instrument of oppression'," quoting DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196 (1989) (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986)).

In determining the existence of an alleged contract "the intent of each party must be 'closely examined.'" Howard Univ. v. Lacy, 828 A.2d 733, 737 (D.C. 2003). Where the material terms in Mr. Preister's four proposed drafts continued to differ from one another and from the oral agreement that he claimed was made the prior year in September 1999, "a contract to make a contract" is no contract at all. Jack Baker, Inc., *supra,* 664 A.2d at 1239. The material terms of Mr. Preister's draft written agreements kept changing and thus cannot be mere memorializations of an oral contract. Mr. Preister's drafts kept changing the proposed terms for equity allocations and financial contributions. His testimony that Petitioner had orally agreed to guarantee him against losses and gave him the right to buy out Petitioner's interest, another pipedream, are not contained in any one of Mr. Preister's draft agreements, rendering it impossible for him to meet his

burden that the contemplated written document is a *mere memorialization* of the claimed oral agreement.

In the case *sub judice*, the existence of multiple drafts of an alleged agreement conclusively proves there was no intent between both parties to be bound and no agreement on material terms. See Novecon v. Bulgarian-American Enter. Fund, 190 F.3d 556 (D.C. Cir. 1999) (a series of four written communications between the parties were "merely part of the preliminary negotiations looking toward the execution of a contract in writing"); In re Office Prod. Co. Sec. Litig., 251 F. Supp.2d. 58, 71 (D.D.C. 2003) (no enforceable agreement existed where two letters supposedly memorializing a verbal agreement described the parties, debtors and calculation of debt differently); International Cargo Mgmt. Specialists, Inc., *supra*, 1995 WL 170376 at *16 (holding that no agreement existed on a profit split where multiple documents and verbal understandings reflected different profit splits).

B. The Parties Failed to Agree on Profit Sharing or Financial Contributions

A critical material term in determining enforceability of an oral contract is agreement as to ownership shares and division of profits and losses. Equally important is agreement as to the respective financial contributions. The record is clear that the parties never reached agreement on either of these critical issues, as Preister's four draft agreements continued to propose different shares and contributions. Profit sharing is a material term of a contract, and an agreement that fails to define the division of profits and losses is unenforceable. See Marathon Enter. Inc. v. H. Angelo and Co., Inc., 229 F.3d 1143 (4th Cir. 2000) (contract unenforceable where no

meeting of minds on sharing of profits on change orders); Kosower v. Gutowitz, No. 00 CIV. 9011, 2001 WL 1488440 at *5 (S.D.N.Y. Nov. 21, 2001); and International Cargo Mgmt. Specialists, Inc., *supra*, 1995 WL 170376 at *1 (International Cargo Management Specialists, Inc. alleged that defendant breached oral agreement to share profits. After finding that profit sharing was a material term, the court held that no agreement was made whereby award fees would be split according to any particular percentage. Id. at *15-16. The court also noted that the absence of a definitive "written agreement in this case has been a disadvantage to the party seeking to demonstrate the existence of an agreement.").

C. Even the Proposed Members of any Joint LLC Kept Changing

Petitioner was unwilling to make Mr. Preister or his company a co-owner of the joint LLC that he sought. The parties failed to agree as to whether Mr. Preister or MidCounty would be the co-member of a joint LLC. (Plaintiff ex. 37, 38, 40, 42.) The identity of the parties to a contract is a material term that must be agreed upon for a contract to be enforceable. See In re U.S. Office Prod. Co. Sec. Litig., *supra*, 251 F. Supp.2d at 71 (no contract existed where two letters memorializing oral agreement described the parties to the agreement differently); Simon, 753 A.2d at 1012 (where settlement agreement bound "landlord" to make monthly payments to tenants, parties needed to reach meeting of the minds as to the identity of the "landlord" in order to create enforceable settlement agreement); Penick v. Frank E. Basil, Inc., 579 F. Supp. 160, 161 (D.D.C. 1984).

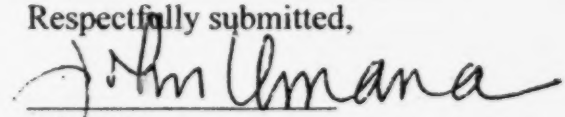
Mr. Preister was adamant in his testimony that he was to be the co-member in the proposed LLC (App. 23,

27-28, 30-31), while Mr. Preister's attorney was equally adamant in his four draft agreements that MidCounty should be Mr. Sisson's co-member in the Chapin LLC. (App. 23-24, 26-27, 30-31) With this undisputed record raised below, how could the lower courts consistent with Due Process permit the $650,000 judgment to Mr. Preister? There was no evidence that established Mr. Preister as the sole owner of MidCounty or that allowed piercing the corporate veil of MidCounty or any ruling to that effect. There was no lawful basis to treat Mr. Preister as the contracting party. Though raised on appeal, the Court of Appeals did not address this fundamental Due Process defect. The judgment cannot be sustained under the Due Process Clause. "Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966).

CONCLUSION

For the foregoing reasons, Charles Sisson respectfully requests the Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,



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APPENDIX A -- OPINION OF THE D.C. COURT OF APPEALS DATED AND DECIDED SEPTEMBER 26, 2005

CHARLES SISSON, APPELLANT,

v. CA2543-01

DANA PREISTER, *et al.*, APPELLEES.

No. 03-CV-986

Appeal from the Superior Court of the
District of Columbia
Civil Division

(Hon. Michael L. Rankin, Trial Judge)

Argued April 5, 2005
Decided September 26, 2005

Before WASHINGTON, *Chief Judge*, [FN*] and REID, *Associate Judge*, and STEADMAN, *Senior Judge*.

FN*. Judge Washington was an Associate Judge of the court at the time of argument. His status changed to Chief Judge on August 6, 2005.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: This case primarily concerns the question whether a valid oral contract existed between appellant Charles Sisson and appellee Dana Preister relating to the purchase of a multiple unit residential property, and if so, whether Mr. Sisson breached the

contract, or his fiduciary duty, or engaged in fraud. The case also raised the question as to whether an attorney and law firm retained by Mr. Sisson were liable for aiding and abetting him, and whether they were negligent. A jury found Mr. Sisson liable and awarded damages. The jury also determined that the lawyer and law firm were not liable on a theory of aiding and abetting, but were negligent, and awarded damages against them equivalent to the closing costs on the property. Mr. Sisson raises several challenges to the jury verdict and the trial court's ruling on motions which he made during and after the trial. We affirm the judgment of the trial court.

FACTUAL SUMMARY

The record before us shows that Mr. Sisson and Mr. Preister engaged in a course of business dealings involving Mr. Sisson's skill in acquiring property, and Mr. Preister's skill in renovating properties. At the time the two men met in Fall 1998, Mr. Sisson had purchased and renovated several properties in the District of Columbia. Mr. Preister had had years of experience as a carpenter, and a construction worker in his father's construction business, and had organized his own company which he incorporated in 1998 as Midcounty Home Improvements, Inc., later changed to Midcounty Construction Company ("Midcounty"). After Mr. Sisson made a $20,000.00 business loan to Mr. Preister, the two men collaborated successfully on the renovation of two properties in the District, and one in Maryland. They reached a verbal agreement as to two of the properties.

When Mr. Preister saw a 28-unit apartment building located in the 1400 block of Chapin Street, in the Northwest quadrant of the District, he discussed with Mr.

Sisson the purchase of the building and its development. Based upon these conversations, Mr. Preister concluded that Mr. Sisson and he had an oral agreement with respect to the purchase, financing, renovation, and conversion of the Chapin Street property to condominiums, with a fifty/fifty sharing of the profits from the condominium sales. Consequently, Mr. Preister made a $25,000.00 deposit on the property with funds from Midcounty. His offer of purchase was accepted and settlement was scheduled for November 18, 1999. Mr. Preister asked Mr. Sisson to form the legal entity which would own the property, based on a fifty/fifty split of ownership. Mr. Preister paid the $2,500.00 appraisal fee for the property. Mr. Sisson approached the Community Bank of Northern Virginia, indicated that the property would be held by an LLC, and suggested that the closing attorney be Mr. Cerullo who worked with the law firm of Houlon & Berman. Mr. Preister paid an additional $25,000.00 to secure his deposit when the closing was delayed. Both men exchanged e-mails about the deal. In one such e-mail that Mr. Sisson wrote while he was away, he said: "Dana [Preister], I know you are moving mountains back there in my absence and I appreciate how you are making sure everything is moving along."

On December 16, 1999, Mr. Sisson formed the 1417 Chapin Street LLC ("the LLC"), the entity designed to purchase the property on which Mr. Preister had placed a deposit. Mr. Sisson named himself as the sole owner of the LLC. On December 17, 1999, the new settlement date, Mr. Preister went to the designated location for the closing, but the other principals were not there. Earlier that day, Mr. Sisson, accompanied by Mr. Cerullo, had closed on the Chapin Street property. After the closing, Mr. Sisson assured Mr. Preister that he would be a partner in the LLC,

but Mr. Preister never became a partner despite his efforts to have the oral agreement reduced to writing.

On April 2, 2001, Mr. Preister file a complaint against Mr. Sisson, the LLC, and Mr. Cerullo and Houlon & Berman, and an amended complaint on July 11, 2001, alleging multiple counts, including breach of contract (Count One), breach of fiduciary duty (Count Two), and fraud (Count Three) against Mr. Sisson; and aiding and abetting (Count Six) and negligence (Count Seven) against Mr. Cerullo and Houlon & Berman. Mr. Sisson filed an answer and counterclaim on August 15, 2001. His affirmative defenses included, fraud, negligence, and failure to mitigate damages. His counterclaim included counts of negligence, and fraudulent misrepresentation. Subsequently, defendants Sisson and the LLC, and defendants Cerullo and Houlon & Berman filed separate cross-claims seeking contribution and indemnity for any judgment awarded against them. Following discovery and the trial court's denial of appellees' motion for summary judgment, the case proceeded to a jury trial.

According to the jury verdict form, the jury found Mr. Sisson liable to Mr. Preister on theories of breach of contract, breach of fiduciary duty, and fraud, and awarded compensatory damages in the amount of $650,000.00 to Mr. Preister. The jury determined that Mr. Sisson did not prove that Mr. Preister failed to mitigate his damages. The jury also found Mr. Cerullo and Houlon & Berman liable to Mr. Preister for negligence, and awarded damages of $450.00 against Mr. Cerullo and $1250.00 against Houlon & Berman. Neither Mr. Cerullo nor Houlon & Berman was found liable to Mr. Preister on an aiding and abetting theory. With regard to Mr. Sisson's counterclaim against Mr. Preister, the jury returned verdicts of no liability on the

fraudulent representation and negligence counts, but found liability for a $46,000 Internal Revenue Service loan and awarded $49,000.00 to Mr. Sisson. As for Mr. Sisson's and the LLC's cross-claim against Mr. Cerullo and Houlon & Berman for negligence, the jury found liability, and indicated that Mr. Sisson was entitled to receive in damages $450.00 from Mr. Cerullo and $1250.00 from Houlon & Berman. The trial court denied appellees' request for post-judgment relief.

ANALYSIS

Mr. Sisson argues that he was entitled to judgment as a matter of law on the breach of contract claim since the alleged oral contract between Mr. Preister and Mr. Sisson "was void...under the Statute of Frauds as an agreement incapable of being performed within one year." He also claims that there was no agreement "on crucial material terms [of the alleged contract]." Furthermore, he faults the trial court for failing to grant his motion for summary judgment on the issue of whether there was a valid oral contract between Mr. Preister and Mr. Sisson. [FN1] He also challenges the award of damages against him, as well as the trial court's denial of his motion for a new trial relating to those damages.

> FN1. While the record before us shows no explicit ruling on the summary judgment motion, it does reveal that the trial court denied all outstanding pretrial motions on the first day of trial, without exception. Moreover, at the end of the plaintiff's case, the trial court entertained a Super.Ct.Civ.R.50 motion for judgment as a matter of law on the Statute of Frauds issue. Mr. Sisson's motion was denied, and the record before us does not reflect any

renewal of the motion at the end of all of the evidence.

Standard of Review

"When the issues of fact were tried by jury, [we]...review the case only as to matters of law." *See* D.C. Code § 17-305 (a)(2001). The grant of a motion for a directed verdict, or for judgment as a matter of law under Super. Ct. Civ. R. 50 (a)(1), is proper "[i]f during a trial by a jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to "render a verdict in favor of the plaintiff. We view the evidence "'in the light most favorable to the non-moving party.'" *Haynesworth v. D.G. Stevens Co.*,, 645 A.2d 1095, 1097 (D.C.1944)(citations omitted). We "will not reverse the trial court's denial of a motion for a new trial....unless the trial court has abused its discretion." *Safeway Stores, Inc. v. Buckmon*, 652 A.2d 597, 606 (D.C. 1994)(citations omitted). Where a new trial motion challenges the amount of damages, we often consider "'whether the award indicates prejudice, passion or partiality or was based on oversight, misstate or consideration of an improper element.'" *Id.* (quoting *Weinberg v. Johnson*, 518 A.2d 985,994 (D.C. 1986)). Moreover, where the challenge is to allegedly inconsistent jury verdicts (here the damages award against Mr. Sisson compared with that against the lawyer and law firm who were found liable for negligence), the complaining party must make an objection on the record prior to the discharge of the jury. See *Estate of Underwood v. National Credit Union Admin.*, 665 A.2d 621, 648 (D.C. 1995).

Statute of Frauds Issue

The trial court instructed the jury as to the elements of a valid contract, explained that a valid oral contract "can exist between the parties," and set forth the law pertaining to a Statute of Frauds objection. No question was included on the special verdict form concerning the Statute of Frauds, and as far as we can tell from the record before us, none was requested. Nor was there any objection to the trial court's instruction to the jury regarding the Statute of Frauds and the existence or non-existence of a valid contract between Mr. Preister and Mr. Sisson.

We conclude that there is some indication on this record that Mr. Sisson may have waived the precise Statute of Frauds arguments he now makes on appeal because he failed to renew his motion for judgment as a matter of law at the conclusion of all of the evidence. See *Daka, Inc. v. McCrae*, 839 A.2d 682, 691 (D.C. 2003) ("The failure to include a particular ground in a motion for a directed verdict will bar the consideration of this ground [both] in a subsequent motion for judgment notwithstanding the verdict and on appeal.") (citations and internal quotation marks omitted). However, even assuming, without deciding that Mr. Sisson properly preserved the particular arguments he makes on appeal, we are satisfied that he cannot prevail on those arguments.

Contrary to Mr. Sisson's contention, there is legally sufficient evidence in the record from which reasonable jurors could decide that Mr. Preister and Mr. Sisson entered into an oral agreement. Under that agreement, Mr. Preister and Mr. Sisson would acquire the Chapin Street property, which was a shell. They would turn that property into condos, and split the profits on a fifty/fifty basis. Mr.

Preister would perform the necessary construction work at below cost, and Mr. Sisson would obtain the financing. There was no agreement to form an LLC. Indeed, the LLC was considered only one way of implementing the oral agreement. And, although a written agreement never was executed, what we said in *Jack Baker, Inc. v. Office Space Dev. Corp.*, 664 A.2d 1236 (D.C. 1995), applies in this case:

> Even if the parties intend to subsequently enter into a written contract, . . . it does not necessarily follow that they have not made any contract until the writing is completed and signed. The parties may be bound by their oral agreement if it meets the dual requirements of intent and completeness.

Id. at 1238 (citations omitted). There is legally sufficient evidence on this record showing the intent of Mr. Sisson and Mr. Preister to be bound by their oral agreement, and that there was agreement as to all the material terms. *Id.*

Furthermore, "partial or complete performance under an oral contract may remove the case from the applicability of the [S]tatute [of frauds]." *Landow v. Georgetown-Inland West Corp.*, 454 A.2d 310, 313 (D.C. 1982) (citations omitted). Here, there was partial performance under the contract. Mr. Preister signed a contract of purchase for acquisition of the Chapin Street property, made an initial $25,000.00 deposit, paid the $2500.00 appraisal fee, and put down an additional $25,000.00 after the deadline for closing had expired. Mr. Sisson approached a bank for financing. This partial performance under the oral agreement removed it from the Statute of Frauds. *Id.* Moreover, legally sufficient evidence was introduced at trial indicating that the oral

contract did not fall within the Statute of Frauds because it was capable of being performed within one year. See *Launay v. Launay*, 497 A.2d 443, 449 (D.C. 1985); D.C. Code § 28-3502 (2001). We find unpersuasive Mr. Sisson's arguments that the oral agreement could not be performed within one year because it would take five years to complete the condominium renovations, and Mr. Preister had to "post a bond and wait at least two years after the condominium units have been renovated and sold before reaping their profits from the condominium conversion." Our case law requires only that the oral agreement "by its terms [be] capable, possible, or susceptible of performance within one year." *Id.* And, as the RESTATEMENT (SECOND) CONTRACTS (1979) states, only "those contracts whose performance cannot possible be completed with a year" are governed by the Statute of Frauds. *Id.* §120, at 328. Nothing in this record suggests that the oral agreement was not susceptible of performance within one year, or that such performance was not possible.

Mr. Sisson contests the award of damages. In particular he complains about the award of lost profits in this kind of tentative business transaction. The jury verdict form did not contain specific questions regarding damages, so it is impossible to tell whether the jury actually awarded damages for lost profits. Even if it did, however, the record reveals that Mr. Sisson did not object to the jury instruction concerning lost profits, and furthermore, based on the evidence which Mr. Sisson introduced concerning lost profits, there was legally sufficient evidence upon which reasonable jurors could award such damages. [FN2]

> FN2. Mr. Sisson claims that the trial court should have excluded testimony by Mr. Riley, Mr. Preister's expert on lost profits. He argues that Mr.

> Riley was not qualified. Not only are questions regarding the admission of expert testimony, as well as the qualifications of an expert, confided to the sound or broad discretion of the trial court, *see Hager v. United States*, 856 A.2d 1143, 1147 (D.C. 2004); *Zoerb v. Barton Protective Servs.*, 851 A.2d 465, 472 (D.C. 2004), but here, the jury's verdict is consistent with evidence presented by Mr. Sisson as to lost profits, rather than the testimony of Mr. Riley. Moreover, because there was no request for a special verdict as to damages, it is impossible to determine the precise basis on which the jury awarded damages.

Although Mr. Preister preserved his argument regarding mitigation of damages, there is no indication that he preserved his specific argument pertaining to the offset of lost profits damages. And, before the jury was discharged after its verdict, he did not object to the amount of the damages awarded against him, on the ground of an inconsistent verdict. Under these circumstances, he cannot prevail on his damages and new trial contentions. Nor does he offer anything demonstrating that the damages award shows jury prejudice, passion or partiality, mistake, or improper consideration. *See Underwood, supra*, 665 A.2d at 648; *Haynesworth, supra,* 645 A.2d at 1097; *Safeway Stores, Inc., supra*, 652 A.2d at 606; *see also Worjloh v. Stephens*, 835 A.2d 1093, 1095 (D.C. 2003).

Accordingly, for the foregoing reasons we affirm the judgment of the trial court. [FN3]

> FN3. We are unpersuaded by Mr. Sisson's contention that the trial court should have declared a mistrial because of testimony by Mr. Konopka, the

expert called by Mr. Cerullo and Houlon & Berman. The trial court gave a cautionary instruction after the expert said a partnership existed between Mr. Preister and Mr. Sisson, and under the circumstances there was no abuse of discretion. *See Lee v. United States*, 562 A.2d 1202, 1204 (D.C. 1989).

So ordered.
ENTERED BY DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

APPENDIX B -- VERDICT SHEET OF JURY OF D.C. SUPERIOR COURT DATED NOVEMBER 26, 2002

DANA PREISTER, Plaintiff

v. Civil Action No. 01-2543
Judge Michael L. Rankin

CHARLES SISSON, et al., Defendant.

VERDICT SHEET

1. Do you find that plaintiff Dana Preister has proved by a preponderance of the evidence that defendant Charles Sisson has committed a breach of contract? You must answer "Yes" or No."

Yes__X____ No_____

Do you find that plaintiff Dana Preister has proved by a preponderance of the evidence that Charles Sisson committed a breach of fiduciary duty? You must answer "Yes" or "No."

Yes__X____ No_____

Do you find that Dana Preister has proved by clear and convincing evidence that Charles Sisson has committed fraud? You must answer "Yes" or "No."

Yes__X____ No_____

If your answer is "No" to all of the above, please proceed to question 2. If your answer is "Yes" to any

or all of the above, please state the amount of compensatory damages, if any, which the plaintiff is entitled to recover as a result of such breach of contract, breach of fiduciary duty, and/or fraud:

Compensatory damages: $650,000

Do you find that defendant Sisson has proved, by a preponderance of the evidence, that Preister has failed to mitigate his damages?

If your answer is "Yes," then by what amount should Preister's compensatory damages be offset by such failure to mitigate? If your answer is "no," then proceed to question 2.

Amount by which damages should be offset: $ 0

2. Do you find that plaintiff Dana Preister has proved by a preponderance of the evidence that Robert Cerullo committed negligence? You must answer "Yes" or "No."

Yes__X____ No_____

Do you find that plaintiff Dana Preister has proved by a preponderance of the evidence that Houlon & Berman committed negligence? You must answer "Yes" or "No."

Yes__X____ No_____

If your answer is "no" to both of the above questions, please proceed to question 3. If your answer is "yes" to either, please state the amount of compensatory damages, if any, which the plaintiff is

entitled to recover as a result of such negligence:

Compensatory damages from Cerullo: $450.00

Compensatory damages from Houlon & Berman: $1250.00.

3. If your answer is "yes" to any of the questions asked above in question #1, do you find that plaintiff Preister has proved, by a preponderance of the evidence, that defendant Cerullo is also liable on a theory of aiding and abetting? You must answer "Yes" or "No."

Yes_____ No___X____

If your answer is "yes" to any of the questions asked above in question #1, do you find that plaintiff Preister has proved, by a preponderance of the evidence, that defendant Houlon & Berman is also liable on a theory of aiding and abetting? You must answer "Yes" or "No."

Yes_____ No___X_____

If your answer is "Yes" to either of the above, please state the amount of compensatory damages, if any, which the plaintiff is entitled to recover as a result of such aiding and abetting. If your answer is "No," please proceed to question 4.

Compensatory damages from Cerullo: $___0___

Compensatory damages from Houlon & Berman: $____0____

4. On defendant Sisson's counterclaim against

plaintiff Preister, do you find that defendant Sisson has proved, by clear an convincing evidence, that plaintiff Preister has committed fraudulent representation? You must answer "Yes" or "No."

Yes_____ No____X_____

On defendant Sisson's counterclaim against plaintiff Preister, do you find that defendant Sisson has proved, by clear and convincing evidence, that plaintiff Preister has committed fraudulent representation? You must answer "Yes" or "No."

Yes_____ No____X_____

On defendant Sisson's counterclaim against plaintiff Preister, do you find that defendant Sisson has proved, by a preponderance of the evidence, that plaintiff Preister has committed negligence in his finishing of the project on 4815 Dexter Street, NW, Washington, DC? You must answer "Yes" or "No."

Yes_____ No____X_____

On defendant Sisson's counterclaim against plaintiff Preister, do you find that defendant Sisson has proved, by a preponderance of the evidence, that plaintiff Preister is liable for the $46,000 IRS loan? You must answer "Yes" or "No."

Yes___X____ No_____

If your answer is "Yes" to any of the above counterclaims, please state the amount of compensatory damages, if any, which defendant Sisson is entitled to

recover as a result of such fraudulent representation, negligence, and/or IRS loan. If your answer is "No" to all, please proceed to question 5.

Compensatory damages: $49,000

5. On defendants Sisson and 1417 Chapin Street, LLC's crossclaim against defendants Cerullo and Houlon & Berman, do you find that Sisson and 1417 Chapin Street, LLC have proved, by a preponderance of the evidence, that defendants Cerullo and/or Houlon & Berman committed negligence? You must answer "Yes" or "No."

Yes___X____ No_____

If your answer is "Yes," please state the amount of compensatory damages, if any, which defendant Sisson is entitled to recover from defendants Cerullo and/or Houlon & Berman as a result of such negligence.

Compensatory damages from Cerullo: $450.00

Compensatory damages from Houlon & Berman: $1250.00

11/26/02 s/ #427
Date Jury Foreperson

APPENDIX C -- JUDGMENT OF D.C. SUPERIOR COURT DATED NOVEMBER 26, 2002

DANA PREISTER
Plaintiff

01CA2543
Calendar Number 2
Judge RANKIN

vs

CHARLES SISSON
1417 CHAPIN STREET LLC
ROBERT CERULLO
HOULON & BERMAN, LLC
Defendant(s)

JUDGMENT

This action came on for trial before the Court and a jury, Honorable MICHAEL L. RANKIN, Superior Court Judge, presiding, and the issues having been duly tried as to compensatory damages only and the jury having duly rendered its verdict, it is this 26th day of November, 2002,

ORDERED

(1) That the plaintiff DANA PREISTER recover of the defendant CHARLES SISSON the sum of $650,000.00 with interest thereon from 11/16/02 at the rate of 4 per cent per annum as provided by law, and his costs of action.

(2) That the plaintiff DANA PREISTER recover of the defendant ROBERT CERULLO the sum of $450.00 with interest thereon from 11/16/02 at the rate of 4 per cent per annum as provided by law, and his costs of action.

(3) That the plaintiff DANA PREISTER recover of the defendant HOULON & BERMAN, LLC the sum of $1,250.00 with interest thereon from 11/26/02 at the rate of 4 per cent per annum as provided by law, and his costs of action.

IT IS FURTHER ORDERED

That as to the counterclaim, defendant CHARLES SISSON recover of the plaintiff DANA PREISTER the sum of $49,000.00 with interest thereon from 11/16/02 at the rate of 4 per cent per annum as provided by law and his costs of action.

IT IS FURTHER ORDERED

(1) That as to the cross-claim of defendants CHARLES SISSON & 1417 CHAPIN STREET LLC'S recover of the defendant ROBERT CERULLO the sum of $450.00 with interest thereon from 11/26/02 at the rate of 4 per cent per annum as provided by law and his costs of action.

(2) That as to the cross-claim of defendants CHARLES SISSON & 1417 CHAPIN STREET LLC'S recover of the defendant HOULON & BERMAN, LLC the sum of $1,250.00 with interest thereon from 11/26/02 at the rate of 4 per cent annum as provided by law and his costs of action.

DUANE B. DELANEY, ESQ.
Clerk of the Court

s/

Crystal Banks, Deputy Clerk

Mailed Dec 19 2002
Docketed Dec 18, 2002

APPENDIX D -- ORDER OF D.C. SUPERIOR COURT DATED JULY 24, 2003

DANA PREISTER,
Plaintiff,

Civil Action No. 01ca2543
Calendar 2
Judge Michael L. Rankin

v.

CHARLES SISSON, *et al.*,
Defendants

ORDER DENYING DEFENDANT SISSON AND 1417 CHAPIN LLC'S MOTION FOR A NEW TRIAL AND OTHER RELIEF

This matter is before the court on defendants' Sisson and 1417 Chapin LLC Motion for a New Trial and Other Relief. Upon consideration of the motion, defendants' Houlon & Berman and Cerullo's opposition, plaintiff Preister's opposition, defendant Sisson's reply and supplemental memorandum, plaintiff's response, and the record herein, it is, this 24th day of July 2003, hereby **DENIED**.

In their motion, defendants Sisson and 1417 Chapin list eight reasons why the court should overturn the jury's verdict and conduct a new trial: (1) the damages awarded for fraud were duplicative of those awarded for breach of contract; (2) the damages awarded for breach of fiduciary duty were duplicative of those awarded for breach of contract; (3) the damages awarded for lost profits were speciously calculated; (4) the fraud and breach of fiduciary duties should not have gone to the jury; (5) the statute of

frauds, here, prohibits recovery on the breach of contract claim; (6) the jury failed to consider mitigation in determining its award; (7) the jury failed to award negligence damages to defendant Sisson and 1417 Chapin; (7) the verdict was against the clear weight of the evidence; and, lastly, (9) the trial was unfair.

None of the above claims warrants overturning the jury's verdict or granting a new trial. A motion for judgment notwithstanding the verdict may *only* be granted when the evidence, viewed in the light most favorable to the nonmoving party, yields but one reasonable conclusion. *Lewis v. Washington Metropolitan Area Transit Authority*, 463 A.2d 666 (D.C. 1983). See also Sup. Ct. Civ. Pro. R. 59. In this case, over the course of a nine-day trial, multiple witnesses testified and numerous exhibits were entered into the record. The case was complex and, given the various accounts presented, was open to more than just one interpretation. The jury, as the verdict shows, weighed the evidence and found that the plaintiff's case was more convincing and, so, the court entered judgment to that effect. The jury's finding, moreover, is not unreasonable; thus the court shall not upset it.

Defendants' Sisson and 1417 Chapin's claims that the damages awarded to plaintiff for fraud and fiduciary duty were duplicative and/ or illegal are unfounded. The verdict form provided to the jury allowed for one sum, rather than a breakdown; thus, defendants have no way of knowing what damages were awarded for which breaches. Moreover, defendants did not object to the form of the verdict sheet at the end of trial and have since lost the right to object to it. See Sup. Ct. Civ. Pro. R. 51. Additionally, the jury was instructed before deliberations on the burdens of proof required for a finding of liability; therefore the jury

was given the legal framework with which to make a proper decision in the case. And, lastly, defendants have not cited persuasive authority on their claims that damages for fraud and/ or fiduciary duty may not stand alongside an award of damages for a breach of contract.

With respect to defendants' remaining claims that the damages awarded for lost profits were speciously calculated, that the jury failed to consider mitigation in determining its awards, that the jury failed to award defendant Sisson and 1417 Chapin negligence damages, the court, similarly, rejects them. These are merely arguments that the jury fully considered before handing down its verdict, which, in light of contradictory - yet persuasive - testimony, was *not* against the clear weight of the evidence.

Lastly, for the reasons listed in defendants' Houlon and Berman and Cerullo's opposition, the court rejects defendants' claim that the trial was fundamentally unfair. It similarly rejects defendants' claim that the statute of frauds prohibits any recovery on the breach of contract claim for reasons set forth in plaintiff Preister's opposition.

It is so **ORDERED**.

S/
Michael L. Rankin
Judge
(Signed in Chambers)

Docketed Jul 30, 2003
Mailed July 30, 2003

APPENDIX E -- EXCERPTS FROM TRIAL TRANSCRIPTS DATED NOVEMBER 2002

[BY MR. GOULD, Plaintiff's counsel, direct of Mr. Preister]

Q. Did you make any proposal to Mr. Sisson with regard to the Chapin Street property?

A. Yes, I had proposed that he join me in this venture, that we do the property together. He would be the financial backer, I would be the construction, would be running the construction company, and I thought it was very advantageous for him to come on, because he wouldn't have to come on the project, just rely on me to do the project and at the end we would be splitting the profits 50/50.

Q. And did you ultimately reach an agreement with him?

A. Yes, we did.

Q. What was that agreement please?

A The agreement was that MidCounty Construction would get the contract to do the work and that Dana Preister and Charles Sisson would form an LLC naming us equal shares to do the project together.

(11/13/02 Trial Tr. 98).

* * *

[BY MR. MCMAHON, Mr. Sisson's trial counsel] [cross-examination of Mr. Preister]

Q All right. Showing you in Exhibit 38 [one of Preister's draft agreements for a joint LLC] at the top, it appears that Mr. Lafionatis [attorney for Mr. Preister] has drafted an, I'm sorry, in the back, it appears that he drafted

it such that MidCounty Construction would be the member --

A Yes.

Q -- of this LLC.

A Yes.

Q Do you know why?

A No, I don't know and I didn't ask him. I just, he just thought that was in my best interest. I don't know why.

(11/13/02 Trial Tr. 141-42).

* * *

BY MR. MCMAHON [Mr. Sisson's trial counsel]: [cross-examination of Mr. Preister]

Q Mr. Preister, would it be fair to say that as far as you were concerned that you had a contract with Charles to make a contract? Would that be fair to say that?

A Yes.

Q Okay.

(11/13/02 Trial Tr. 159).

* * *

[BY MR. MCMAHON, Mr. Sisson's trial counsel] [cross-examination of Mr. Preister]

Q Yeah, but why don't you tell the jury if there's any reference to a partnership or an LLC there [Mr. Preister's emails].

A No.

Q No, Now you knew you were getting into an LLC, did you not?

A Yes.

Q Because Charles told you that?

A Yes

Q So it okay to use the term LLC rather than a

partnership?

A Yes.

(11/13/02 Trial Tr. 180).

* * *

[BY MR. MCMAHON, Mr. Sisson's trial counsel]
[Cross examination of Douglas M. Bregman, Esq., expert for Mr. Preister]

Q We talked about the LLC that took title here of 1417 Chapin, the lawsuit. Are LLCs in writing in D.C.?

A In order to have an LLC, a limited liability company --

Q Right

A -- it's different from a partnership. Partnerships you can have -- we can all enter into partnerships. You and I could agree to have a partnership today and go do something with it, but an LLC is a company. It's a limited liability company. And in order to form a company of that nature you have to file the articles of organization with the office in the Government that -- that accepts or rejects those people who are applying for the right to the [sic] have such a company. So, yeah, you need to have a writing and it has to be accepted by the Government and become an official legal entity called a limited liability company.

(11/14/02 Trial Tr. 177-78).

* * *

THE COURT: The plaintiff rests. And the defendants want to address the court on some issues. In terms of presenting evidence, have the defendants decided who is going to go first?

MR. MCMAHON: I guess -- Your Honor, we haven't spoken about it. Mr. Fuchs just pointed his finger at

me. So, I gather he wishes me to proceed, and I have no problem with that.

THE COURT: All right. Reserving all rights, do you have any evidence that you want to lead off with at this time?"

MR. MCMAHON: Well, your Honor, I can have -- I am sorry. I can have Mr. Sisson take the stand and start into his direct examination in terms of what our case is all about for the jury.

THE COURT: I think that would be a good idea, and then we can break at an appropriate time and go back to the point at which you reserved all rights.

MR. FUCHS: Your Honor, you didn't specifically direct your remarks to Mr. Cerullo, but I presume all rights are reserved for all defendants?

THE COURT: Absolutely.

(11/18/02 Trial Tr., 152-53)

* * *

[BY MR. MCMAHON, Mr. Sisson's trial counsel] [direct examination of Mr. Sisson]

Q Now, before either of those projects [Wissioning and Dexter] are completed, does Mr. Preister raise the issue of his 50 percent ownership in the Chapin LLC?

A At the end of 2000, towards -- roughly the end of the construction at Dexter he did bring to me on different occasions three drafts of a revised operating agreement for 1417 Chapin LLC.

Q Did he say where he got those from?

A He said that he had a lawyer prepare them.

Q Now, you say there is three. And they are in the exhibits. But do you recall what month he approaches you with agreement number one?

A Not exactly. I think -- I really -- somewhere October, November of the year 2000, somewhere in there.

Q Okay. Does he physically hand you a document?

A Yes, he did.

Q Okay. And his words when he hands you the documents are what?

A Well, he would like this to be the revised -- the operating agreement for 1417 Chapin.

Q Okay. And what was your reaction to that?

A Well, I thought it was a mischaracterization of our relationship. And, again, there were three of them [draft agreements] that came about. All of them -- the interesting thing about it is, that all three of them had different -- there were differences and there were similarities. All three of them had not Dana Preister as the other member of the agreement, but it would be MidCounty Construction. It would not be Dana Preister. The second thing is that was outstanding in my mind was, that in each case it called for the MidCounty Construction to become a member of the LLC. It didn't say anything about a partnership, or anything like that. It was that he wanted an arrangement of the LLC.
(11/18/02 Trial Tr. 186-87.)

* * *

[BY MR. MCMAHON, Mr. Sisson's trial counsel]
[cross-examination of Mr. Preister]

Q Okay. Is there anything that you agreed to with Mr. Sisson orally that's in that written document?

A Just that we would be partners.

Q When you say partners --

A Or members in an LLC.

Q You say 50 percent in the LLC membership interest?

A Yes.
(11/20/02 Trial Tr. 415.)

* * *

[BY MR. MCMAHON, Mr. Sisson's trial counsel]
[cross-examination of Mr. Preister]

Q So you could never have -- well, ... given the fact you thought a bond would go up three years after the last closing, assuming that occurred sometime next year, which is 2003?

A Yes.

Q Would it be your understanding then that it won't be until 2006 that you would have gotten your hands on that money represented by the bond proceeds?

A It wasn't my understanding that we would finish in 2003 either.

Q What was your understanding? Which year would you finish in?

A Well, if we started the beginning of 2001, like it was anticipated, we would have been done a year later.

Q Okay. Would that be 2002?

A Yes. So three years after that.

Q Okay. So when you say start in 2001, are you talking about -- did you make a mistake to 2000 or 2001? The closing occurred December 17, 1999?

A Right.

Q Are you saying it started in 2000 or 2001?

A Sorry, 2000.

Q Okay. So let's go -- that's my last question, too. We got September, October, November, December four months in 1999, correct?

A Correct.

Q And then we have 12 months in 2000 --

A Yes.

Q. -- to do the brunt of the construction work?

A Yes.

Q And I think you testified there would be some additional time for change orders?

A Yes.

Q Three to four months?

A Um, hard to say.

Q But nonetheless, we are then into year 2001?

A Yes.

Q Okay. And in year 2001, what was your understanding? Would the units be sold out sometime during 2001?

A Yes, towards the end of that year.

Q Okay. And then towards the end of 2001, November, December?

A Yes.

Q Okay. So then the bond goes up and at that time you would then anticipate getting your profits from that $300,000 three years from November, December, 2001?

A Yes.

Q Okay. Which would be 2004?

A Correct.

Q Okay. Thank you very much Mr. Preister.

THE COURT: Just for the jury's benefit. This matter of putting a bond on a new unit that is going to be sold, can you explain to the jury the purpose of a bond?

THE WITNESS: The purpose of the bond is so -- from what Mr. Sisson had told me, because I had never been directly involved with that, but what Mr. Sisson told me, to the best of my recollection is, that the developer puts up this money in case there is any tenant disputes. If the furnaces doesn't work, the elevator doesn't work, it kind of warrantees the work against the building for a certain time until things settle in, and then that bond can be re-issued back to the builder or to the developer if there are no

problems with construction. To the best of my knowledge that's what it is.

THE COURT: So the law requires a bond be posted and no profits be taken until the bond expires?

THE WITNESS: From that bond, yes.
(11/20/05 trial tr., 426-28).

* * *

BY MR. GOULD [Mr. Preister's counsel on direct]

Q Mr. Preister, when Mr. Lafionatis drafted the various LLC documents which you were just questioned about, and you provided them to Mr. Sisson, did you believe at that time that those documents memorialized the deal that you and Mr. Sisson actually reached prior to the closing?

A Well, yes, I did, because it was Mr. Sisson that invited me to take the LLC documents to my attorney to have them drafted. It absolutely did.

Q Was your deal before this closing a one thirds, two thirds?

A Before the closing?

Q Yeah. Let me backup and make sure you understand my question. The LLC documents that Mr. Sisson -- that you provided to Mr. Sisson after closing --

A Uh-huh.

Q -- that had Mid County as a proposed member?

A Correct.

Q Was that your agreement with Mr. Sisson that it would be MidCounty or it would be you personally with Mr. Sisson?

A My agreement was me personally with Mr. Sisson.

Q In the LLC documents that you provided Mr. Sisson afterwards had a different percentage than the

50/50?

A That's right.

(11/20/02 Trial Tr. 436-37.)

* * *

Voir Dire Examination [of defendant Cerullo's expert Arthur F. Konopka]

BY MR. GOULD [plaintiff counsel]: Do you purport to be an expert in partnership law?

A. No. I created a partnership --

THE COURT: Excuse me? Whether he purports to be or not, he was not proffered in that area and a proper objection would certainly solicit a proper response from the court.

(11/20/02 Trial Tr., 528.)

* * *

[BY MR. GOULD, Mr. Preister's counsel]

[cross-examination of Arthur Konopka, Esq., legal expert for defendant Cerullo]

Q Let's go back to this partnership. Your opinion is predicated on the assumption that Mr. Cerullo believed a partnership existed between Dana Preister and Charles Sisson, is that correct?

A Yes.

MR. MCMAHON: May we approach, your Honor?

THE COURT: All right.

MR. MCMAHON: I am sorry, your Honor, but what I heard Mr. Cerullo testify to was a business relationship. I didn't think he testified that he knew there was a partnership between these folks, but a business relationship.

THE COURT: These terms are being sort of bandied around like they are interchangeable. And I agree with you that they need to be accurate and not to miss speak on that.

MR. GOULD: I was very intentional in the way I asked that question. I wanted to nail down what it is his assumption is based upon.

MR. MCMAHON: Your Honor, can we have that explained to the jury in some fashion, Your Honor, about that? I don't want them, again, thinking Cerullo testified to the fact that this is a partnership. ***

Q And your opinion that Mr. Cerullo met the standard of care in this case is predicated on the assumption that Mr. Cerullo believed at the time that a partnership as defined under the Uniform Partnership Act existed between Mr. Preister and Mr. Sisson, is that correct?

A Well, I am willing to say that he [Mr. Cerullo] believed there was a partnership between them, that they were acting in concert. What portions of the Uniform Partnership Act would apply, I would be reluctant to say. There are several different forms of partnership. But my answer is, that I believe that he believed -- or was entitled to believe there was a partnership between them. ***

MR. MCMAHON: ... But your Honor, I want to be on the record for, you know, moving for a mistrial. And I never thought I would ever want to try this case again. But my client has been extremely prejudiced by the statements and the colloquy. I am not saying he tried to bring this out about the partners analysis. But it is now very clear to the jury that Cerullo knew that there was a partnership.

(11/20/02 Trial Tr., 561-566)

* * *

[THE COURT to the jury:]

I want to make a comment to you regarding the evidence in this case. And I want to remind you that any time I comment on the evidence, it is not my intention of trying to intimate to you how you should decide this case. Indeed, you are free to disregard any comment that seems to express a finding of fact. The findings of fact are solely within the province of the jury. When I comment, it is to try to make sure you are clear on testimony and clear on the issues. You are asked to decide in this case whether there was a partnership agreement between plaintiff and the defendant Charles Sisson. Now there has been different testimony about -- from other people about what this person believed or what this person knew, or thus and so. And after speaking with the lawyers, and after remembering testimony, it seemed that the expert witness Konopka gave testimony that the defendant, the individual defendant Cerullo, knew at some point in time before the settlement that there was a partnership between Preister and Sisson. That is an issue in the case for you to decide, that is, whether or not there was. And so if there is testimony in the case, I am not saying there is, but if there is testimony in the case, if there is evidence in the case that Cerullo knew that, that's for you to decide. The expert witness was asked to make assumptions. And based on those assumptions, to render his opinion. But the assumptions that he was asked to make has to be based on the evidence in the case. And whether there is evidence in this case that Cerullo knew of a partnership between those men is for you to decide. And, in fact, whether there was a partnership between them is for you to decide.
(11/20/02 Trial Tr., 570)